No. 6859.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

United States of America,
Appellant,

vs.

Ronald Baxter,
Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

STATEMENT.

Ronald Baxter, appellee, hereinafter called plaintiff, brought suit on a policy of war risk insurance. By his complaint he alleged the existence of the policy; that on the 22nd day of October, 1918, while said policy was in force, he received a gunshot would in left wrist, shrapnel wounds in lumbar region of back, loss of bone structure from back at the ilium, and fracture of the 4th lumbar vertebra. Plaintiff alleged that as a result of said injuries he was rendered on the 22nd day of October, 1918, totally and permanently disabled; that thereby he became entitled to payments under his insurance contract.

The appellant, hereinafter called defendant, by its answer, admitted the existence of the policy, admitted said policy was in full force and effect on the 22nd day of October, 1918, denied the injuries alleged, admitted that if while the policy was in force plaintiff suffered total and permanent disability said insurance became payable to the plaintiff in monthly installments of $57.50. The defendant alleged said insurance policy lapsed for non-payment of premium due on July 1, 1919.

From the evidence and under appropriate instructions a jury rendered a verdict to the effect that plaintiff became on the 22nd day of October, 1918, totally and permanently disabled. From a judgment entered thereon the United States of America has appealed.

PERTINENT STATUTES AND REGULATIONS.

Total permanent disability under this contract is defined by Treasury Decision No. 20 W. R., a regulation promulgated under and pursuant to statutory authority. It provides:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed (in Articles III and IV) to be total disability.
>
> "Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person, to whom any installment of insurance has been paid, as provided in Article IV, on the grounds that the insured

has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments of insurance shall be discontinued and no further installments shall be paid so long as such recovered ability shall continue."

Ford v. United States (C. C. A. 1), 44 Fed. (2d) 754.

ARGUMENT.

By its Assignment of Errors [Tr. pp. 72-73-74] (Brief pp. 6-7-8) defendant in substance makes two contentions from which a reversal of the Judgment herein is requested:

(1) that evidence incompetent under the issues made out by the pleadings was admitted by the trial court;

(2) that the evidence was insufficient to sustain a judgment for plaintiff.

Attention is directed to the fact that neither of said reasons, during the course of the trial, was stated as a reason why a verdict should be directed for the defendant. [Tr. p. 63.] Attention is also called to the fact that no motion, during the course of the trial, was made to strike any alleged incompetent evidence or otherwise to eradicate any prejudice which may have come to the defendant by reason of the Court's failure to sustain the defendant's objection. It will be noted that at the time the objection was made no evidence had yet been introduced by the witness. After the testimony had been received, during the course of the trial, no complaint was made that said evidence did not tend to prove the issue made by the

pleadings. In *Falvey v. Coates* (C. C. A. 8), 47 Fed. (2d) 856, at page 857, the Court stated:

> "The motion for a directed verdict interposed by the defendant stated no grounds upon which it was based. Had the motion been denied, this court would doubtless have declined to review the ruling of the court in denying it because of its insufficiency. A motion for a directed verdict should specifically state the grounds upon which it is urged. It was due the lower court that its attention be specifically called to the grounds upon which the motion was based; it was due to opposing counsel so that they might have an opportunity, either intelligently to oppose the motion, or ask to reopen the case for the introduction of further testimony, or for leave to amend the pleadings, or to move for a nonsuit; it was due the appellate court so as to enable the court to see whether or not the grounds alleged were the same as those presented to the trial court. Where a motion for a directed verdict, failing to state the grounds upon which it is based, is denied, it is unfair to the trial court and to the appellate court; but, where it is granted, it is unfair to the party against whom it is granted;"

And, as stated in *Robinson & Co. v. Belt*, 187 U. S. 41, 23 S. Ct. 16, 19, 47 L. Ed. 65:

> "While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reviewed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*."

Notwithstanding, from Treasury Decision No. 20 War Risk, above set out, and from numerous decided cases, the issue to be determined in these cases is: Did the insured during the life of his policy become, within the definition, totally and permanently disabled? Any evidence on that point would seem to be competent and cogent. The issue of total and permanent disability, during the life of the policy, was directly alleged in the complaint and positively put in issue by the answer. The substance of the testimony objected to and given by Dr. Thomas J. Orbison, a distinguished man in his profession, is [Tr. p. 31]:

> "My diagnosis is as follows: gunshot wound in lower dorsal region; lower back with concussion of the spinal cord consequently or sequently. That is what followed. What followed that? Psychoneurosis. What is the type of psychoneurosis? That is the neurasthenic type."

The doctor then testified that, in his opinion, plaintiff was not able to follow continuously any substantial gainful occupation as a result of the injuries received on October 22, 1918; that considering the history of the case, the diagnosis made at the time of the injury, the plaintiff had been unable to follow continuously any substantially gainful occupation since the date of his injury on the 22nd day of October, 1918, and that since the date of the injuries the disabilities were based on conditions which rendered them reasonably certain to remain throughout the lifetime of the plaintiff.

That the defendant could have been surprised by testimony of a nerve injury, due to the wounds described

in the complaint, would seem hardly reasonable in view of testimony submitted by their own witnesses. Dr. Miles J. Breuer, a witness on behalf of the defendant, in his deposition [Tr. p. 50] testified:

> "I saw him frequently in my official capacity during the years of 1919 and 1920, maybe a dozen times during that period. During that time I made several physical examinations of Ronald Baxter * * * I noticed in my examination a large scar due to an H. E. wound in the sacro region, a scar on his wrist, a decrease in weight and general physical vigor and an *unstable condition* of the *nervous system.* * * * For the stomach and nervous condition I advised diet, rest and medicine."

On cross-examination Dr. Breuer testified that the plaintiff was not physically and mentally feasible for vocational training on June 22, 1920.

Dr. Rock, a witness on behalf of defendant [Tr. pp. 54-55], testified that he had examined plaintiff in 1928. He testified that the plaintiff was given a complete physical examination. In response to the following questions in direct examination, he testified:

> "Q. And did that examination cover such things as would determine if his spinal cord had been injured by that scar? A. Yes, sir.
>
> Q. Or not? A. Yes, sir.
>
> Q. In what manner was that tested, Doctor? A. Do you mean for injury to his spinal cord?
>
> Q. Yes. A. Well, it comes under the head of reflexes, his reactions, nervous reactions, to various impulses.
>
> Q. Was there a complete examination made in that regard? A. Yes.
>
> Q. Did that examination show that there was any injury to the spinal cord? A. Yes, sir."

On cross-examination Dr. Rock testified [Tr. p. 58] that at the time of his examination:

> Plaintiff complained of "general run-down condition, no pep, weak, work or exercise for an hour requires three hours to get over it; weakness appears to be more in the back and hips; does not rest well at night; appetite is poor; pain in lumbar region all the time; this is increased on exercise or being on feet; also has pain in left leg from being on feet; has weakness of left hand; has sharp darting pains in left side of face; these come and go." The doctor testified that such complaints are not unusual in a person suffering from a nervous condition or a nerve injury.

In *United States v. Tyrakowski* (C. C. A. 7), 50 Fed. (2d) 766, at page 768, the Court, after discussing the definition of a total disability as used in a war risk insurance contract, stated:

> "In order for appellee to recover it was not necessary for him to prove that such disability occurred while he was serving in the war nor that it was occasioned by such service. *It is sufficient if it occurred from any cause prior to lapse of his policy at midnight on August 31, 1919.* On the other hand the policy does not cover any total permanent disability which began after August 31, 1919, even though it was caused by his service in the war." (Italics, this writer's.)

and on page 770:

> "He does not attempt to classify his disease by name and it is not necessary for him to do so."

In *Hayden v. United States* (C. C. A. 9), 41 Fed. (2d) 614, may be found a strikingly similar injury and proof with substantially the same pleadings.

It is respectfully submitted that, if counsel did not know that there was a more serious condition than the loss of skin or muscle due to the injuries alleged, he should, with reasonable investigation in view of his own testimony, have known such fact.

POINT II.

Sufficiency of Evidence to Support Verdict for Plaintiff.

Defendant's contention is stated in paragraph five, page five, of their brief as follows:

> "The other and more important point is that plaintiff failed to establish total disability in that an actual work record, even of a part time job such as was performed in the Soldiers' Home, defeats the proof of total disability."

Plaintiff's record in the Soldiers' Home appears from the testimony of Arthur J. Cassiday [Tr. pp. 61-62], a witness on behalf of the defendant, and from the testimony of plaintiff. [Tr. p. 21.] In order to obtain an accurate view of this part time work, which defendant contends shows as a matter of law plaintiff was able to follow continuously a substantially gainful occupation, plaintiff's history and efforts under competition should be observed. Plaintiff's testimony disclosed:

> That at the time of his enlistment he was 25 years of age; that he had attended school until he was 14; that prior to entering service he had worked regularly as a farm and ranch hand; that on the 22nd day of October, 1918, while engaged in combat at the front he had been seriously injured by being struck in the wrist and in the dorsal region of his back. [Tr. pp. 18-25 incl.] He testified that at the time of the injury he was almost cut in half and left on the field to be picked up by stretcher bearers; that at the time of his injury he was paralyzed from the waist down for several months and that he remained in the hospital from the date of his injury to the date of his discharge. While in the hospital, and

thereafter, he had had pains in his back and pains in his head; that his stomach had bothered him and that he had been unable to pass urine without aid; that since his injury he has experienced difficulty and discomfort at all times, especially while on his feet or walking, this in the small of his back and in the left hip and left leg; that he had difficulty getting rest at night; that he has had pains in his shoulders and in the back of his head; that he could not hold his body up easily; that to a certain extent he has dispensed with the use of a brace; that these complaints have continued up to the date of trial.

The Adjutant General's report [Tr. p. 18] shows the following record made of the injury prior to the plaintiff's discharge from service:

> "Shrapnel (1) scar 10 inches long oblique through lower lumbar and sacrial region fracturing spine at 5th lumbar vertebra and crest of left ilium; (2) superficial scar posterior surface of wrist left."

With this conceded permanent injury, the record disclosed the following industrial history:

> That upon being discharged from service plaintiff obtained employment as a night watchman; that after two months he had to give this up because incidentally in the position it was necessary for him to handle oxygen drums and because he suffered from physical exhaustion. [Tr. p. 19.]
>
> That thereafter he entered vocational training, under government supervision, taking first an agricultural course, then a music course, then a business course, then a salesmanship course; all of which were unsuccessful; then he was declared unfeasible for further training. [Tr. p. 19.]

That his training was a failure because of difficulty in concentrating, because of his extreme nervousness and because he could not get the required rest at night because of injuries received in service.

He then sought employment and obtained a position with the Dixon Book Company, which employment ended after two weeks; selling books required walking and he could not stand on his feet.

He sought employment with the Goodyear Tire & Rubber Company and with the Telephone Company and was turned down by each after a physical examination. [Tr. p. 20.]

He then sought employment with the Shore Investment Company on a purely commission basis. This he had to give up after about two weeks [Tr. p. 23] * * * this required walking on pavement and he could not stand the pace. Thereafter in 1924 he entered the Soldiers' Home in Sawtelle, California.

From this evidence, it is submitted, the jury had the right to believe:

(1) That the Government, after sincere efforts to rehabilitate the plaintiff in some occupation which would give a reasonable livelihood, had failed due to plaintiff's disabilities;

(2) That because of disabilities suffered by the plaintiff he was unable to compete with men of sound body and average attainments under the usual conditions of life. See *United States v. Cox* (C. C. A. 5), 24 Fed. (2d) 944.

The plaintiff testified:

That shortly after entering the Soldiers' Home in 1924 he obtained a position as an elevator man

> and janitor. [Tr. pp. 21-22.] He testified that he then followed this occupation for three or four years. [Tr. pp. 22-23.] The records of the institution, however, disclose that he worked from October until December, 1924, at $25 per month; that he was next employed between February and May, 1925, at $24 per month; from August to November, 1925, at $24 per month; that he was not again employed until 1927, when he worked from January to March at a salary of $24 per month; from April to July, 1927, at $28 per month; from September, 1927, to March 1, 1929, at $24 per month; on March 1, 1929, his salary was increased to $35 per month, and this he received until October 30, 1930. On November 26, 1930, he again went to work at a salary of $40 per month, which he was receiving at the time of trial in July, 1931. [Tr. pp. 61-62.]

Counsel in his brief (p. 13) seeks to leave the impression that plaintiff left and re-entered the Soldiers' Home. We think such statement may be compared with counsel's impression in his brief (pp. 3-4) wherein he states:

> "Plaintiff testified that after his discharge from the army he attempted to do certain work requiring the handling of heavy boxes * * * he also had a job as night watchman for a short time;"

The record is clear that these two jobs are one and the same [Tr. p. 19]; and to counsel's inference in his brief that a part of the remuneration received for the work done at the Soldiers' Home was the board and room supplied to the inmates. Likewise to counsel's statement, under Specification of Error No. 5 (Brief p. 7), wherein he comments:

> "This specification is based on the fact that the evidence is undisputed, that plaintiff had actually worked at a substantially gainful occupation almost continuously since October 8, 1924, a period of about eight years."

Of course, it is plaintiff's contention herein that the evidence shows no substantially gainful occupation. Whether the "almost" refers to the period of time between the date of trial in July, 1931, and a date of eight years after plaintiff's record appears in the Soldiers' Home, which would be October 8, 1931, or whether it refers to the five months in 1925, the year of 1926, the 45 days in 1927, or the 26 days in 1930 in which plaintiff did not work, is not clear. While it may be possible that a jury, from the present state of the record, could deduce that plaintiff had left and returned to the Soldiers' Home, the inference in this court is to the contrary. The testimony, as it appears in the record, is that the plaintiff now lives in the Soldiers' Home [Tr. p. 18]; that he entered the Soldiers' Home in 1924 [Tr. p. 21]; that right after entering the Home he went to work as a janitor and elevator operator at which job he remained for three or four years [Tr. p. 23]; from his testimony the three or four years would be late in the year of 1927 or 1928. It is clear, we think, the evidence does not bear out counsel's statement or impression, that plaintiff left and reentered the Soldiers' Home.

Part Time Work in Soldiers' Home Does Not Show as a Matter of Law That Plaintiff Was Able to Follow Continuously Any Substantially Gainful Occupation.

In this court:

> "The appellee is entitled not only to the most favorable aspect of the evidence which it will reasonably bear, but is also entitled to the benefit of such reasonable inferences as arise out of the facts proved."
>
> *United States v. Meserve* (C. C. A. 9), 44 Fed. (2d) 549-552.

The evidence is:

> "The duties are taking care of picking up laundry and distributing laundry and company property to the men and looking after the company generally. The actual work amounts to about one hour a day. I was not required to work continuously. The duties do not require it. I could do all the work there was to do in less than one hour and then I was free to do as I pleased from then on as long as I stayed around the company." [Tr. p. 21, testimony of Baxter.] Also see testimony of Newcomb. [Tr. p. 62.]
>
> Such jobs are given only to inmates of the institution and to the better type of individuals in the institution. Testimony Cassiday [Tr. p. 62] and Newcomb. [Tr. p. 62.]

It is submitted the jury had the right to conclude that such duties were not employment at all, but rather a reward for good character and right living, thereby assisting in maintaining discipline among the inmates of the institution.

In *Hayden v. United States, supra,* under somewhat similar circumstances, Judge Dietrich stated:

> "And we think it a question for the jury whether his conduct in that respect (lack of occupation) was due to disability or unwillingness or some other cause."

In *Sorvick v. United States* (C. C. A. 9), 52 Fed. (2d) 406, this court stated:

> "In measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff we must bear in mind the remedial purposes of the World War Veterans Act * * *, which the Courts have repeatedly held should be liberally construed in favor of the veterans."

Fairly, it would appear, in no better way may the definition of a total disability in a war risk insurance policy be construed liberally than to allow the words in the definition to have their full force and usual meaning, that is, to allow a "substantially gainful occupation" to mean a substantially gainful occupation; not to substitute in law a "mere pittance" for the words substantially gainful occupation.

In *United States v. Sligh* (C. C. A. 9), 31 Fed. (2d) 735, Judge Gilbert said:

> "The term 'total and permanent disability' obviously does not mean that there must be proof of absolute incapacity to do any work at all. It is enough if there is such impairment of capacity as to render it impossible for the disabled person to follow continuously any substantially gainful occupation."

In *United States v. McPhee* (C. C. A. 9), 31 Fed. (2d) 243, this Court stated:

> "Total and permanent disability within the meaning of a war risk insurance policy does not mean absolute incapacity to do any work at all."

In *United States v. Phillips* (C. C. A. 8), 44 Fed. (2d) 689-691, the Circuit Court of Appeals for the 8th Circuit stated:

> "The term 'total and permanent disability' does not mean that the party must be unable to do anything whatever; must either lie abed or sit in a chair and be cared for by others."

In *United States v. Rasar* (C. C. A. 9), 45 Fed. (2d) 545-547, this Court stated:

> "The mere fact that appellee may be able to engage in some light occupation requiring very little physical effort, or that he may work at short intervals at some character of employment, does not imply that he may not be totally disabled within the meaning of the World War Veterans Act, as amended, 38 U. S. C. A., Section 473, and its regulations * * * if his disability renders it impossible for him to pursue continuously any gainful occupation for which he is physically and mentally qualified, that in law amounts to total disability."

In *Wood v. United States* (D. C.), 28 Fed. (2d) 771, Judge McDermott, speaking of a veteran, plaintiff, an inmate of a Soldiers' Home, who made some income by picking up and distributing laundry, said:

> "I am of the belief that when, by reason of physical or mental disability, the insured is compelled

> to drop out of the ranks of the workers of the world, and stand by the side of the road and watch the world go by, there is liability under the policy."

It is submitted that to hold as a matter of law the part time employment herein set out, requiring less than one hour a day, and then not continuously, entailing no mental or physical effort, would be to hold that any work at all disproves total disability within a war risk insurance contract. It would be to hold that an inmate of a charitable institution has not dropped out of the ranks of the workers of the world. We submit that such would be unreasonable and arbitrary, and contrary to the definition of the terms accepted by most of the courts. (*Burgoyne v. United States* (Ct. of App. D. C.), 57 Fed. (2d) 764-766.)

Substantial Testimony Tending to Show Total Disability.

In *United States v. Burke* (C. C. A. 9), 50 Fed. (2d) 653-656, this Court stated:

> "The right to a jury trial is guaranteed by the constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto."

In *United States v. Tyrakowski, supra* (p. 770), the Court stated:

> "The only question presented to us is whether or not there was substantial evidence submitted to the effect that appellee was totally and permanently disabled on or before July 31, 1919. We think appellee's testimony alone prevents us from answering this question in the negative, in view of the Treasury Department's definition of total disability."

In the instant case the testimony is that repeated and prolonged efforts on behalf of the Government to rehabilitate the plaintiff, after his injury, resulted in failure. The testimony is that the plaintiff made repeated efforts to follow an occupation and each effort resulted in failure, due to the injury received when the policy was in force.

The testimony of Dr. Orbison is that:

> "Now, within the definition, the plaintiff is totally disabled; that he was totally disabled on the date of his injury and at all times thereafter. [Tr. pp. 31-32.] That the plaintiff has a decided phychoneurosis and an involvement of his vegetative nervous system, that he got at the time he got his shock to the cord. [Tr. p. 40.] That the injury will prevent the plaintiff from doing any work rather than the plaintiff becoming injured by the work he does." [Tr. p. 38.]

The testimony of Dr. Orr, a witness on behalf of the defendant, is that the plaintiff was a patient of his clinic during the year of 1920, and under cross-examination [Tr. p. 49] Dr. Orr testified:

> "At the time I examined him, he was having an amount of pain and disability that might have interfered with many kinds of employment."

The testimony of Dr. Miles J. Breuer, a witness on behalf of the defendant, is that he saw the plaintiff frequently during the years of 1919 and 1920; and in cross-examination [Tr. p. 51] Dr. Breuer testified:

> "At that time he was probably unable to follow continuously any gainful occupation. * * *" "The spinal column is an important part of the human anatomy."

and in redirect examination [Tr. p. 51]:

> "From my observation of this man it appeared to me that he was one of those constitutionally subnormal people who are not quite fully equipped to fight life's battles independently * * *"

From Government's Exhibit "A", it was noted at the time of plaintiff's discharge from the army:

> "The wound or injury is likely to result in death or disability."

From the testimony of Dr. Rock, a witness on behalf of the defendant [Tr. p. 55], who examined the patient in 1928:

> "The examination showed an injury to the spinal cord"

and further [Tr. p. 57]:

> "My opinion is that the man's disability will not improve or get worse. It is stationary in its present stage."

Conclusion.

It is respectfully submitted that the evidence shows, that at a time premiums were paid on the plaintiff's policy of insurance, plaintiff suffered a severe and permanent injury; that the evidence disclosed he has not followed continuously any substantially gainful occupation; that there is substantial evidence showing that the reason for said lack of substantially gainful occupation is because of the injuries received; and that the verdict of the jury should be sustained.

Respectfully submitted,

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